



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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April 20, 2001

Mr. Robert Springer, Director
Waste, Pesticides, and Toxics Division
U.S. Environmental Protection Agency
77 W. Jackson Blvd.,
Chicago, IL 60604-3507

Subject: Local Government Liability Exemption Proposal

Dear Mr. Springer:

Since last summer WDNR and U.S. EPA have been discussing various methods for improving our ability to cleanup and redevelop Brownfield sites where hazardous waste activities have taken place. One option we are very interested in, is being able to use enforcement discretion to apply the liability exemption criteria in Wisconsin statutes to Local Government Units or Economic Development Corporations. Our proposal provides for a case-by-case analysis in order to determine whether an exemption from the RCRA Subtitle C liability requirements is appropriate given the site-specific situation.

At a meeting on March 9, 2001 you indicated that we should prepare a letter which provides the specific details on our proposal. You went on to say that the letter needs to identify the criteria we would use in determining whether the use of enforcement discretion was appropriate and would also need to include a pilot process in order to evaluate how well this type approach can be implemented. What follows is background material along with our specific proposal.

Background Information

There are thousands of brownfields properties located in Wisconsin, with many in need of local cleanup and redevelopment assistance. However, even when local governments have the authority to acquire such properties, officials are often reluctant to do so because of concerns about potential federal and state environmental liability. In the past, local governments that acquired contaminated property, even if they did not purchase it, were considered responsible under Wisconsin's Spill Law because they "possessed" or "controlled" the contaminated property.

The State's Land Recycling Law, which became effective in 1994 and was subsequently modified in the 1997-1999 state budget, provided certain limitations on a local government's environmental liability under the Spill Law and created incentives for local governments and certain economic development corporations to redevelop property, depending on how the property is acquired. Specifically, if a local government acquires property through tax delinquency, bankruptcy proceedings, condemnation, eminent domain, escheat, for slum or blight elimination, by using Stewardship funds, or from another eligible local government, the local government is not responsible for investigating or remediating the hazardous substance discharges at the property. This exemption from liability protects a municipality unless the release is caused by an action taken by the municipality or due to failure of the municipality to take limited actions to prevent further spills.

In the past, the local government exemption from the Spill Law did not apply to discharges from a federally regulated underground storage tank. The 1999-2001 state budget changes the exemption to include properties where a discharge was from a federally regulated tank. However, local governments are still responsible for removing abandoned underground storage tanks.

Federal Exemptions

There are liability protections under the federal Superfund law for local governments, but RCRA does not provide the same protections. Specifically, section 101(20)(D) of CERCLA provides that: a unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign entity, is not considered to be an owner or operator.

In October, 1995 the EPA issued a policy clarifying that when a municipality acquires property through tax delinquency, foreclosure, demolition lien foreclosure, escheat, abandonment, condemnation, or eminent domain, the municipality will not be held liable for contamination by the federal Superfund program. This policy was subsequently adopted as law in 1996. This exemption also applies to municipalities that acquire property from a county that took the property through an involuntary action.

WDNR Proposal

The lack of a liability exemption for sites with RCRA implications significantly reduces the ability to cleanup and redevelop properties because the local government could become the "owner/operator" and therefore potentially subject to full RCRA liability. Given the thousands of Brownfields sites in Wisconsin, hundreds of which previously managed RCRA wastes, additional incentives are necessary to assist local governments and economic development corporations interested in acquiring properties with RCRA implications. Therefore,

we are proposing to implement a 36-month pilot program where WDNR could use enforcement discretion to provide a site-specific liability exemption to existing RCRA requirements. In order to be eligible to receive a liability exemption local governments and economic development corporations would need to meet the provisions in s. 292.11(9)(e), Wis. Stats. (Please see attached statutory language and fact sheet).

Utilizing this approach would help leverage the assistance of local governments and economic development corporations to ensure that we achieve our goal of increased Brownfields cleanup and redevelopment. This is especially critical at blighted or tax delinquent properties, where the person that caused the contamination is not able to pay for the cleanup of their RCRA Brownfields property. These properties are often left to the community to handle, through their limited financial capacities.

The pilot program would be implemented as follows:

- The Local Government Unit would submit information to WDNR on the property that they wish to acquire. The submittal would need to specifically identify which of the criteria listed in s. 292.11(9)(e), Wis. Stats., would be used,
- As part of the submittal, the LGU would need to request that WDNR review the information and provide them with a written clarification of their liability under RCRA and the State Spill Law.
- If the Department determines that the criteria set forth under s. 292.11(9)(e), Wis. Stats., are met then the LGU would be exempt from the provisions of ss. 291.25(1) to (5), 291.29, and 291.37, Wis. Stats., and rules promulgated under those provisions provided the LGU:
 1. Complies with the requirements of s. 292.11(9)(e)2., Wis. Stats.,
 2. Determines if any containerized material on the property is defined as hazardous waste, and
 3. Ensures that any containerized hazardous waste is properly managed in accordance with the state hazardous waste rules (NR 600 series).
- Economic Development Corporations seeking to acquire a property to further the economic development need to follow the requirements contained in s. 292.11(9)(e)1s., 4., and 5., Wis. Stats., and the steps listed above in order to be eligible for a liability exemption from the provision in RCRA.

During implementation of the pilot, WDNR will track all projects where the use of enforcement discretion to provide a liability exemption to RCRA requirements was approved. The list of cases will be sent to EPA on an annual basis. Within 6 months following completion, WDNR will prepare an evaluation on the success of the pilot and will submit the report to EPA for review. During the time EPA is evaluating the information, and following an EPA response, this process can continue to be fully utilized, unless EPA specifically requires changes to be implemented.

Mr. Robert Springer – April 20, 2001

Summary

This proposal specifies that any local government considering taking title to a property would need to submit a request for a general liability clarification letter to WDNR. The letter needs to specify the reason they are taking title to the property and specifically request a response from WDNR clarifying their future liability, including under RCRA. This approach would allow the Department to track the number of requests received, as well as to document whether an exemption to liability was granted and the reasons why the particular decision was made. Our proposal would also provide for a mechanism to disapprove submittals that don't specifically meet our statutory requirements and the provisions of the pilot proposal.

We look forward to receiving your concurrence with this proposal. If you have any questions regarding this letter, please do not hesitate to contact Mark Gordon at 608-266-7278 or Darsi Foss at 608-267-6713

Sincerely,

Mark F. Giesfeldt, P.E., Director
Bureau for Remediation and Redevelopment

Suzanne Bangert, Director
Bureau of Waste Management

c: Air and Waste Management Team
Remediation and Redevelopment Management Team
Waste Management Team
Deb Johnson – LE/5
Mark McDermid – CE/8
Gerry Phillips – EPA Region V

Attachs.

s. 292.11, Wis., Stats.
ch. 291, Wis., Stats.
LGU Fact Sheet